SECURITIES ARBITRATION COMMENTATOR

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SAC ROUNDTABLE DISCUSSION

Arbitration in 2017 and Beyond: Making Arbitration Great Again

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Panelists: *(in alpha order)*
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SAC: *This is SAC's fifth in a line of video podcasts relating to securities arbitration. The title of our program, "Making Arbitration Great Again," borrows from the new President's slogan, as we expect a new start for arbitration may be at hand -- hopefully, a positive one. Our Panelists will tell us if we're right.*

This recorded discussion occurred in early April 2017. As we go to press, events have already transpired that prove our Panel prescient, e.g., the Gorsuch confirmation, and the House Committee passage of the Financial Choice bill potentially repealing Dodd-Frank.

For those who would rather listen than read, a video podcast of our recorded session has been posted on SAC's YouTube Channel. The podcast is most easily accessible through a "button" link on the Homepage of SAC's Blog. The video podcast includes a PowerPoint presentation as a visual guide to the discussion and differs in other respects from this modified transcript. Not having the PowerPoint here, we've italicized the moderator's comments as a guide to directional shifts in the presentation.

Our speakers are introduced briefly above; more detailed bios appear at the end of this article. One observation: including our moderator, we have three former NASD/FINRA Directors of Arbitration participating in today's podcast -- Deborah and George, thank you! We thank all our guest speakers for participating in this program. We ask our readers to understand that the statements, opinions, and projections of our speakers are their own personally and do not represent necessarily the views of the organizations or institutions with which they are associated.

SAC: *George, please address the first topic on our agenda: what is our commander in chief's stand on arbitration?*

FRIEDMAN: It's my belief that President Trump likes arbitration, because he has used it in the past as a businessman for many years. He had arbitrations involving real estate matters in the 1980s at American Arbitration Association, when I worked there, and he continues to employ arbitration as a tool. The *Indisputably.org* dispute resolution blog reported that the Trump Campaign used arbitration in employment agreements, even for "volunteers."

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Most importantly, since he was elected and took office, there's been further evidence that he likes arbitration.

For example, President Obama signed an Executive Order that basically said, if you want to do business with the federal government and the contract involved is worth a million bucks, you cannot mandate arbitration of Title VII sexual harassment or assault claims. Under the Congressional Review Act, Congress can nullify regulations that are passed within a certain timeframe. Long story short: a resolution was adopted by both Houses of Congress and the President signed it in late March, effectively nullifying the regulation.

Now some ask, why didn't he just do an executive order, and I said to my students at Fordham Law, it's just like the ServePro commercial -- it's like it never happened. The effect of the nullification is like the regulation never existed. It's retroactively nullified. So, to me it shows that the President likes arbitration and will continue to support it.

Also, the regulatory review that he ordered February 3rd basically directed the heads of the agencies to review all kinds of regulations over a 120-day period, and report back to him. That would be roughly the beginning of June 2017. The DOL Fiduciary Rule and the Consumer Financial Protection Bureau's proposed class action ban are caught up in that. In fact, the fiduciary rule on April 4th was swept up in that and has been officially delayed for 60 days. That basically means, instead of the fiduciary standard rolling out on April 10th, it's going to roll out around June 9th, which is coincidentally, more or less, when that 120-day review period runs out.

Last, we'll talk about Judge Gorsuch a bit later, but, suffice to say, it looks like he's pro-arbitration. I'm not sure that was a driver for the President's nomination, but it's there. I think going forward you're going to see more of the same, a President who embraces arbitration. I don't think he will sign any of the anti-arbitration bills that have been introduced that you'll hear about later, with the exception of one, perhaps. But I think we are going to see a pro-arbitration President.

SAC: *So, Peter, if George is right on that, is the anti-arbitration movement dead?*

MOUGEY: I don't want to say dead, but I think it's on ice or life-support for the time being, at least while there's the proverbial hat trick -- the GOP hat trick. I don't see the anti-arbitration movement getting any traction over at least the next four years. At this point, I think that, at the very least, we'll maintain the status quo, in that we won't see any movement made, or any progress made, towards having arbitration be just one of the choices, as opposed to mandatory.

For example, in the financial services industry, investors, in order to

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participate in our financial markets, essentially have to agree to arbitration. I don't see any progress being made on that front, at least in the next four years. I'd say, at the very least, on ice or life support over the next four years.

SAC: *George, you mentioned anti-arbitration bills in Congress. Can you give us a bit more detail?*

FRIEDMAN: We would have to do another podcast for this one, but I'll keep it brief. One of my colleagues at AAA many years ago would deal with arbitrators who called and said, "why am I not getting cases?" And he would say, "many are listed, but few are chosen." Well, many arbitration bills have been introduced but few if any will be enacted in my opinion.

This year alone to date, ten anti-arbitration bills have been introduced, all by Democrats. I'm going to pick on Republicans later by the way, but these were introduced by Democrats, six alone on March 7th. Some are re-introductions and some are new. Some amend the Federal Arbitration Act, some amend specific statutes, some both. Some aim to protect different groups, such as consumers, investors, employees, those with certain civil rights claims, service members, and whistleblowers. Some ban pre-dispute arbitration agreements. Some create procedural safeguards, like hearings open to the public (by the way, I'm not sure I agree with that last one). Some are prospective and some are retroactive. I think that's a problem -- retroactivity. All in all, though, I think the Democrats are going to have a hard time getting these passed.

A few of these bill that are of interest to our audience. Our old friend, the Arbitration Fairness Act, is back again! It would ban arbitration in a wide range of disputes: employment, consumer, including securities, I think. It's been introduced in every Congress going back to probably 2007. Then, there's the Investor Choice Act. If you had any question about whether securities arbitration disputes are covered under Arbitration Fairness Act, the Investor Choice Act says they are. That one would amend the '34 Act and the Investment Advisers Act of 1940 to ban mandatory arbitration in broker-dealer and RIA disputes, to let customers pick a forum and to guarantee class participation.

I should also mention the proposed Arbitration Transparency Act, because it would require hearings be open to the public in securities or investment-type cases, and consumer cases. The Arbitration Transparency Act should not be confused with the Mandatory Arbitration Transparency Act. The first one is in the House. The Senate bill, with almost the same name, is totally different. That one would ban arbitration agreements that have confidentiality provisions in the employment and consumer contexts, including investments.

Then, the Justice for Victims of Fraud Act essentially would deal with people who are victims of the Wells Fargo fictitious account problem. It doesn't single out Wells Fargo customers, but basically says, you can't enforce an arbitration agreement involving a fictitious investment or credit card account of any sort. Finally, the Restoring Statutory Rights Act essentially would undo all the Federal Arbitration Act decisions that have held state laws preempted.

Now, why not just have one bill that covers all this stuff, but we don't.

I think all but one of these bills are doomed to failure. The one I think that might have a shot is the Justice for Service Members and Veterans Act, which essentially would say you can't require a returning service member or veteran to arbitrate employment disputes, unless they agree *after* the dispute arises. Why do I think it might be enacted? Well, it actually got Republican co-sponsors when it was introduced in the last Congress. Also, I think the President has clearly demonstrated he supports people serving in the military. So, I think this one might have a chance.

Anyway, that's where we are right now and time will tell.

SAC: *Peter, if the anti-arbitration folks are not batting well on achieving the mandatory arbitration ban, might they turn towards tolerating arbitration and trying to make it fair, or more fair, in their view?*

MOUGEY: I'm going to say, not anti-arbitration, but pro-choice, as far as being able to select arbitration versus state or federal court, depending on the size and nature of the case. I think the two have gone hand in hand; it's been a double-pronged approach, meaning that investors, consumers, should have the opportunity to select which forum, as opposed to mandatory arbitration. That went hand in hand with ensuring fairness in arbitration. So, I think the best way to have more and more investors and consumers in arbitration, whether it be FINRA or any of the consumer arbitration forums, is to make the process more and more transparent and more and more fair towards both parties.

I don't believe that these concepts represent a pro-claimant or pro-investor movement. It's simply having the ability to choose as opposed to a contract of adhesion. I don't think there's going to be a shift in focus necessarily, because I believe that there has been a two-pronged approach that went hand in hand all along. I don't expect, for example, some of the bills that George just mentioned -- I don't expect those to go away -- for example, Minnesota Congressman Ellison's bill was just reintroduced. I think that they will continue with their goals and objectives of trying to make arbitration a choice or an option.

And at the same time, you will see continued movement from consumer advocates and investor advocates to level the playing field or ensure fairness. I think the two go hand in hand. I don't think that the pro-selection side will go away given the current political landscape.

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SAC: *Matt, what's your reaction from the defense perspective?*

FARLEY: Well let's start with what's unfair about it? The idea that we…, what are we up to now, 20 years, no, 30 years of arbitration that has been put through the ringer in various modifications and permutations -- the idea that it's unfair if the customer doesn't have a choice, well, that was decided 30 years ago by the U.S. Supreme Court. They have a choice if the broker-dealer chooses to have an account document that doesn't require arbitration. I'm told there's one or two out there. But why do we have to mandate that every broker-dealer doing business has to surrender arbitration and allow themselves to be sued again?

SAC: *Class action waivers, Matt, not present in securities arbitration, at least on the customer side. Are they fair to use in other industries' disputes?*

FARLEY: Look, there is a tension -- a real tension -- between Congressional intention in the Federal Arbitration Act and the class action theory of allowing small claims, small-individual claims, to be aggregated. Has that tension led to some unilateral actions by many businesses getting into arbitration, using it in a way that automatically avoids a class action? I'm open to hearing about that, but I don't think it's a pandemic.

SAC: *Deb, switching angles a bit, but staying with the current temper in Washington -- Judge Gorsuch. Tell us where you think the confirmation will go and what are Judge Gorsuch's views on arbitration, from what we know.*

MASUCCI: I do believe that Judge Gorsuch will be confirmed by the Senate and will be sitting on the bench in the near future. We know that Judge Gorsuch comes from the 10th Circuit, where he served since 2006. We also know that the 10th Circuit really has not seen a lot of arbitration cases. But look at the arbitration rulings that Gorsuch has made. They suggest that he's likely to continue the trend of the U.S. Supreme Court in favor of Federal Arbitration Act preemption. As we know, while Gorsuch sat on the Court of Appeals, he followed the Supreme Court and its precedent. His rulings treat the Federal Arbitration Act as establishing a substantive federal law favoring arbitration that preempts conflicting state law actions.

A central question in most of those cases has been whether, under generally accepted principles of contract interpretation, the parties agreed to submit their disputes to arbitration. Judge Gorsuch's opinions have interpreted the arbitration clauses in light of overriding presumptions in favor of arbitration. However, those cases don't really answer the situation involving class action waivers, where there is very little in the record of cases that he has decided.

One case which may be instructive, is where he filed a dissent in a National Labor Relations Board ("NLRB")case. In that case, Gorsuch rebuked the NLRB for exceeding its authority under an enabling statute. So, he may well see cases involving class action waivers as an opportunity to limit the discretion of the NLRB by concluding that holdings invalidating class action waivers exceed its authority under the Federal labor laws. I think that we will have to watch. I can say that he's likely to continue Judge Scalia's favoritism towards arbitration. He's not going to be likely to create law; he's going to strictly interpret legislation in favor of arbitration.

SAC: *That was a good run down! Does anybody else have comments about the Court before we move on?*

FRIEDMAN: I'll go. This likely isn't the last appointment. There probably are vacancies coming, but only God knows when.

MASUCCI: The pundits pretty much anticipate that Judge Stevens will retire midyear. So that's another opportunity for a new judge, perhaps in the summer of this year. We always watch the other justices because they are getting up in age and are very frail.

FRIEDMAN: As we found out...

SAC: *Yes! I'm going to move to the next topic, one with a more forward-looking slant -- the future of financial regulation. Deb, may I ask you to please stay "on the mic" and tell us about Dodd-Frank. Is it long for this world?*

MASUCCI: When I look at Dodd-Frank, I keep in mind that a lot of the regulations under Dodd-Frank have still yet to be written. So, it's taken a long time to implement. The regulators themselves have just been slow in promulgating a lot of the provisions that were contemplated by Dodd-Frank.

We do know that the Dodd-Frank-created Consumer Financial Protection Bureau ("CFPB") has proposed an arbitration rule banning class action waivers. From my perspective, whether or not that rule will become effective depends on whether or not the CFPB will continue to exist. I think there's a strong view that the whole department will either cease to exist under President Trump's review of the government or it might be folded into an existing organization, like the FTC or another agency. To me, there's really no sense in having this separate organization with a lot of free-wielding authority under its belt.

Another question: will Congress repeal the SEC's Section 921 authority to ban or limit pre-dispute arbitration agreements? That authority has been in place for many years and the SEC has failed to exercise any ban or limitation on pre-dispute arbitration agreements. They have gone the route of disclosure and I think many people look at those regulations in a positive way. Especially in light of who will be the new SEC Chair, I don't see the SEC exerting any authority under 921. On

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the other hand, I do see that Congress will leave that authority alone.

SAC: *I agree that the SEC will continue to have that power. What if Congress were to take it away, Deb? Will that imply that the SEC can no longer regulate in the arbitration area?*

MASUCCI: I would find it hard to believe that Congress could mean that, especially in light of the SEC's *amicus* brief in the *McMahon* decision, where the whole premise behind the Court's enforcement of pre-dispute arbitration agreements was based on the regulatory oversight of the SEC.

So, I just don't see that happening. I more so see the CFPB and its authority over arbitration going away. One of the areas though that we might talk about later does have to do with money -- if Congress starts to reduce authorizations to the SEC, one wonders if the span of their regulatory actions will alter when they have less money.

FRIEDMAN: I think also the Commission would have a tough time after all these many years to say, "You know what, we realize this is a terribly unfair system that we've been oversighting for the past 30 years." Doesn't mean they can't recommend changes or place certain limitations, but I think an outright ban would be politically very difficult as well.

SAC: *Let's take Deb's remarks as a segue, Matt, and move into our next subject -- is the CFPB long for this world?*

FARLEY: I hope not! But let's just review what CFPB is. It has a roving portfolio over 19 different agencies and statutes all involving customers intersecting with money. It has a single director who's not reporting to the President and it has a budget that Congress does not enact. What could possibly go wrong in a democracy?

The *PHH* decision [*PHH Corporation v Consumer Financial Protection Bureau,* No. 15-1177 (DC Cir. Oct. 11, 2016)] is probably the writing on the wall. They didn't pull the trigger on it. But, at this point, the Director has been by judicial decree made subject to the President's pleasure and, if the ruling holds, will probably get fired.

I don't know why Congress would want this thing out there. It's frustration and abdication to the nth degree. From a regulatory point of view, the *PHH* decision is just the first drop of the shoe. But anything the CFPB doesn't like, it doesn't have to defer to Congress' statutes. The sheer arrogance.…

Let me tell you about the *PHH* decision. It is a terrific read! It's not just jurisprudence. In the underlying case, the Board actually argued that it was not bound by any of the statutes of limitation in any of the statutes that it oversaw.

SAC: *The PHH decision is due next for re-hearing en banc by the Court of Appeals. So that one's yet to be decided and it could go to the Supreme Court either way. Will the GOP bills that are in Congress now preempt a decision by the Court of Appeals and eliminate the CFPB or restructure it in a way that could save it?*

FARLEY: Well, the real question is why do we need a super agency doing the work that should be done by the other 19 who have expertise in their lines of business? Anytime this agency gets its nose out of joint, it just runs roughshod over the existing agencies. We're talking student loans, car loans, mortgages, not just securities here, but securities as well. Congress will regret the day that it created this Frankenstein outside of its budgetary process.

SAC: *Deb and Matt, we've heard from you on CFPB. Anybody else want to comment before we move on?*

FRIEDMAN: I want to weigh in. Again, the *PHH* decision is now under *en banc* review. The original decision last October basically said the CFPB's structure is unconstitutional, because the Director is too independent and should be terminable at will by the President. Right now, he can only be terminated for cause. There are *three* inconsistent GOP bills to deal with this.

One would essentially codify *PHH* and say CFPB is an executive agency and that the single Director serves at the pleasure of the President. That's one approach. Another bill says let's just get rid of this CFPB altogether, and yet another one, a third bill wants to make it like the SEC -- five commissioners with staggered terms -- and make it an independent agency. So, the Republicans should settle on one of these approaches, but I do think there's a strong possibility that one of these will be enacted before the *PHH* case is finally decided.

Ultimately, I agree with the other panelists. One way or another, I don't think CFPB, as it's currently constituted, is long for this world.

By the way, one piece of trivia. One of the *amicus* briefs filed on behalf of the CFPB in this re-hearing *en banc* included as signatories the original Dodd and Frank.

MASUCCI: One further area that we do have to watch -- there's a lot going on right now in Congress with health care and with the tax code revision. There's foreign turmoil and there is a lot of political turmoil going on around the world. But I think that we have to watch the mid-term elections in 2018. We may see Congress change again, and then the question is, will the reins change hands?

Will the Democrats then be in the majority? And will they have enough wins behind them to really embolden the CFPB or not? Will there be another reversal and an acceleration in regulations? Will Congress adopt legislation that most regulatory departments will not act on because they are being led by Trump appointees? That goes to a prediction that we'll have later,

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but I think congressional changes will define what will happen in the future.

SAC: *George, moving on to the next subject -- the DOL's proposed Fiduciary Rule. It's not really an arbitration issue per se, but it has an impact, we believe, on securities arbitration and, potentially, on liability outcomes. It's now on hold, you told us before. What else needs to be said?*

FRIEDMAN: The Rule establishing the fiduciary standard rule for those who provide retirement investment advice was published about a year ago. The SEC has its own authority under Dodd-Frank to define a broker's fiduciary role, but it has not done so yet. So, the Department of Labor went ahead with its own rules. As I said before, right now, there's a 60-day delay built into the fiduciary rule, meaning around the time the agency has to do its report to the President in June, the rule will either roll out or, in my opinion at least, it won't because I think it's actually not long for this world.

I think we're going to end up with a single unified rule dealing with this issue, probably under the Commission's auspices, dealing with this issue, because right now it's an invitation for investor confusion. Adding to the confusion, I think many of the firms affected by the DOL's Rule will go ahead with the fiduciary standard anyway. They weren't waiting for the last-minute. Many of them have already set up to roll out the fiduciary standard.

So, it's going forward on a voluntary basis. You're going to see some confusion, but, again, when the dust settles, I think there will be a unified rule under the Commission's auspices.

FARLEY: My problem with the fiduciary rule is that there is no current landscape. There is no judicial landscape in the broker-dealer context. It's easy to say that the fiduciary duty is the highest standard of performance known in jurisprudence. That just gives somebody a moral leg-up on whatever happened and whether Respondents' motives were pure.

But, in *SEC v. Chenery* [*SEC v. Chenery Corp.*, 332 U.S. 194 (1947)], the Supreme Court reminded us that labeling somebody a fiduciary does not end the inquiry; it begins it. I think if you want to portray yourself, even if you're a broker, as an advisor, you may pick up that duty. I don't have a problem with that. What I'm having a problem with is the imposition of a fiduciary duty as the only way of conducting the business. I don't think the past hundred years has been a disservice to the investing public and suitability is still a good way to go in many cases.

MOUGEY: If I could chime in on that. Matt just pointed out, there's no judicial landscape. I find that troublesome, and the reason why there's no -- or especially recently, in the last 30 years -- no judicial landscape under the rubric of fiduciary duty, especially for broker-dealers or Series 7 reps is because of the arbitration clauses. We don't see a lot of these cases in state and federal courts anymore. It's essentially unreasoned opinions coming out of FINRA.

I think that's a tremendous disservice that the jurisprudence under the rubric of fiduciary duty and in the context of Series 7 financial advisors, as they call themselves, is not there. It's kind of a travesty that we really don't have the guidelines.

The problem with the suitability context, I think at the end of the day, is that the fiduciary concept is how the firms hold themselves out. It's how they market themselves. It's how they describe themselves to their proposed clients, in both advertising and their internal materials. And, then, when they're asked to hold themselves to that standard, the same standard as that which they advertised and held themselves out, they throw up their hands and say, there's no fiduciary duty because we were wearing our Series 7 hat, not our investment-advisor hat. That, quite frankly, is a foreign concept to investors.

So, I think that fiduciary concept is important and, quite frankly, it is doing nothing besides holding the firms accountable to the exact same standard as they hold themselves out.

SAC: *Fiduciary duty provides another segue. There's been a pretty broad migration from the securities industry of brokers who are, at least currently, moving from a suitability standard to a fiduciary standard by becoming RIAs. The RIA space has grown dramatically in the past five or seven years. The SEC and the states have been regulating that space, not FINRA. Have they done a good enough job or will there be an SRO for RIAs required in order to get financial regulation where we need it to be?*

MOUGEY: I don't think they have not done a good enough job. I don't think that's the issue. To me, the issue is more one of confusion on the side of the investor. As Matt just pointed out, the argument is that a Series 6 or Series 7 kind of broker -- a transaction-based advisor -- doesn't have a fiduciary duty. On the other hand, you've got the investment advisor overseen by the state or the SEC, depending on the assets under management, that there is a fiduciary duty entailed. So, oftentimes, that could be the same individual, depending on what hat they're wearing.

I see this not necessarily as one regulator doing a better or worse job than the other, but that there is not necessarily a standard, uniform structure that oversees the industry. It depends more which hat you're wearing. Is it the series seven hat? Or is it the investment-advisor hat?

Unfortunately -- I'm going back to the point I just made about the marketing -- it's almost impossible to discern the difference from an investor's perspective, as to which hat the financial advisor is wearing -- I don't remember who just said this, but to say that you don't have a problem with one who holds himself as an advisor being called

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a fiduciary, but their titles any more are all "financial advisor."

So, at the end of the day, I think that's why it's important to have all of them, whether it be RIAs or series seven, under the same rubric or regulatory structure, so as to clarify that one set of duties applies to everyone. That's preferable to some arbitrary distinction over what set of registration that you choose.

In today's world, most Series 7 FAs have migrated to the platform where they're acting as investment advisors anyway. We might as well go ahead and get it all under one rubric. Putting that underneath the auspices of FINRA makes a lot of sense.

Do I see that happening? Probably not, but it would certainly make sense, which doesn't seem to be the standard for at least the next four years.

FARLEY: I think there are financial considerations. The SEC manages to examine RIAs once every ten years and that's because they don't have the resources to examine more frequently. The job is not going to go to FINRA, unless the RIAs agree to fund their own regulation, and they're hesitant to do so. Somebody has to put the pedal to the metal.

MASUCCI: The way I look at it, if anyone is going to break the way government is used to working, it's going to be President Trump. I think that he's taking a fresh look at all of the government agencies, trying to reduce duplication and trying to consolidate wherever he can. His claim to fame will be a reduction in the cost of government and, looking at those costs, he's going to try to consolidate as much as possible. And if it's money that's needed to regulate RIAs, I can see him making a deal with the RIAs to have them fall under the rubric of FINRA or another organization and let them regulate that.

Keep in mind that some 20 years ago we had multiple regulators at the New York Stock Exchange, the American Stock Exchange, and the NASD. Now, we basically have one regulator as a self-regulatory organization and I think that consolidation is going to continue.

FRIEDMAN: There's been some reticence on FINRA's part to pursue this book of business. I think that may change because, as Rick noted, their "lunch is being eaten" with this migration from the BD model to the RIA model.

Ultimately, I think that would augur well for the arbitration forum. If everyone's under one roof, then all the arbitrations would tend to be under one roof. Right now, for RIA arbitrations, the forum could be FINRA. But it also might be AAA or JAMS, and there's some confusion there as well. So, I think there should be change at FINRA towards becoming more aggressive to get the business.

SAC: *Well, this is an interesting topic. I could go with this one for a while. It's going to be an interesting four years; I think we've established that. There's going to be a lot of changes in arbitration and, perhaps, financial regulation. Those changes may or may not be good for the future of arbitration.*

By way of closing remarks, please tell us what you believe might happen in the next four years; at the end of this current administration, will we have an arbitration regime that is the same or very different from today? You may pick your issue or speak more broadly on the topics we've covered in this session.

Peter, where do you think we're going to be in four years?

MOUGEY: I'm not going to go too far out on a limb on this one. I think that we're not going to see a world, a regulatory scheme, too much different than what we're looking at right now. I don't think that we're, from my perspective, going to make any progress as far as consumer protection and I do not believe that the regulatory scheme, whether it be the SEC's or FINRA's, is going to change. I don't think that we will see a fiduciary rule imposed on the Series 7 side or the FINRA side across the board. I do think that it will be imposed with the DOL rule on the retirement accounts -- IRAs and so forth. I don't think that we're going to see any change with mandatory arbitration or class-action waivers. I think they're all going to be the same.

The one comfort I take from the first few months of President Trump's administration is his inability to get things done -- unwind Obamacare to start off with…. If you can't rally around unwinding Obamacare, I'm taking pretty good comfort that we're not going to see some others -- like Dodd-Frank and some of the regulatory schemes enacted by the Obama administration -- unwound and undergoing wide swaths of change. I think we're going to see a very similar landscape to what we see now. So, I don't see a lot of change.

I don't think that there's going to be a lot of difference in four years in what we're looking at right now on either side.

SAC: *Thank you Peter! Matt, no change, a lot of change? What's your view?*

FARLEY: More than Peter envisions. I think there will be consolidation of financial regulation. Will it be the one-master regulator over all? No. But the President's agenda is to rationalize a great deal more and, to the extent he succeeds in that, we'll have fewer people working in Washington or working for Washington and doing more important things. I anticipate that FINRA will expand and pick up registered investment advisors. And I can explain that in two words: Bernie Madoff.

And I think there will generally be an easing of the foot-on-the-pedal attitude that some regulator in Washington knows best how to conduct a business that he's never worked a day in his life in. I also think we will see much less

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regulation by ambush and by litigation. Instead, there will be more proposals, based on feedback -- "how can we make this better?" -- and efforts to get everybody in the room involved, rather than blindsiding them.

SAC: *All right, thank you Matt!*

Deb, I don't want to tell you what you ought to wrap up with, but, given your international perspective, I would certainly like your view on dispute resolution around the world? So, for instance, where do you think securities arbitration is going to be four years from now from a global standpoint?

MASUCCI: I was thinking about the global perspective earlier when we were talking about fairness. That was an issue that came up after the *McMahon* decision and I was there defending the securities arbitration process as being fair. But, we all know that perception trumps actual fairness.

There's a lot that's happened in the securities arbitration arena that has been brought into other domestic (USA) and international arbitration processes. Right now, there is an organization called Arbitrator Intelligence and what they're doing is collecting international arbitration Awards, specifically, in the investor-state area, to make them publicly available so that there's not just secrecy about what arbitrators do in that arena. That's what we did in the securities area 30 years ago. We made awards publicly available.

What we are also seeing is arbitrators who are trained in the securities area are now deciding cases outside of the securities area, whether, again, it's domestic (USA) or international in nature. So, people are going to be learning their skills as neutrals in the securities area and bringing them forward into other arenas. I think that's a benefit to the dispute resolution area.

On a whole, though, I don't see arbitration growing the way it has in the past, because I think it's going to be overtaken by mediation and collaborative dispute resolution processes.

I've been involved in an initiative called the Global Pound Conference, where we're having events or gatherings in 30 cities in 24 countries throughout the world. It started in March of last year in Singapore and it will end in July of this year in London. The information that we're gathering basically says that users -- and that would be the plaintiffs' bar as well as the defense bar -- the focus being in our case, not consumer disputes, but commercial disputes -- want a combination of non-binding and binding processes -- collaborative and adversarial processes -- so that the parties have the advantage of both. The parties will use and combine these mechanisms and I think go to arbitration as a last resort when they can't get what they want from mediation.

SAC: *Thanks very much! George, you get to close things out. I know you like to predict the future. You're pretty good at it, too.*

FRIEDMAN: Well, prediction critics can't definitively say you're wrong, unless they claim to be from the future. So, browsing through the issues we've covered, here goes:

First, I don't think there'll be a CFPB four years from now.

Next, I think Dodd-Frank -- I'm not sure they will argue whether it's a repeal or a change -- but Dodd-Frank or its replacement will definitely be *very* different, and I think the 921 and 1028 authority for the Commission and CFPB to ban pre-dispute arbitration agreements is going to be out.

Third, as I said before, we'll have a unified fiduciary rule under the SEC's umbrella.

Fourth, I think we'll still have mandatory arbitration. As I've said, I have no love for class-action waivers, but I think the NLRB's going to lose in the Supreme Court next term on that issue. I do think that there will be a warm embrace of FINRA in terms of fairness, because I do believe it's an exemplar of fairness and it will be viewed that way.

And, finally, the majority of arbitrations are going to be online in four years. I have to say that, given I am the Chairman of the Board of Arbitration Resolution Services -- an online ADR service -- but, I do think we're heading in that direction.

MASUCCI: I think, George, you need to explain what you mean by online. I believe there will be more technology used for arbitration, but not necessarily just electronic. There will be a greater use, and we've seen it already, in the international arena of video-enabled.

FRIEDMAN: Yes. May I spend 20 more seconds? I think the last frontier will be moving away from physically showing up somewhere to do a hearing. I think in large cases folks are still comfortable appearing in person. But, some of the technological changes we're going to see will be amazing, with 3D, videos and … so, yes, when I said online, I don't mean that not having hearings. But, I think they're going to look a lot different than showing up in person.

SAC: *A subject for another podcast....*

FRIEDMAN: Yes.

SAC: *We have heard a spectrum of views during this latest Roundtable discussion. That is what we seek from our speakers, so thank you very much to this Panel. I think it's been a terrific program. Deb, George, Matt, and Peter -- great job!*

Be sure to follow our Panelists and the Securities Arbitration Commentator on social media. You can also visit SAC's Blog, where, at some point, you'll find our next podcast. As always, please tell us how we're doing.

Please turn to the next page in order to view the biographical credits of our speakers in this Roundtable discussion.

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FACULTY BIOS:

Moderator:

Richard P. Ryder is the founder and President of Securities Arbitrator Commentator, Inc. (SAC) and Editor-in-Chief of SAC's publications. SAC has been continuously publishing since 1988 and today offers a variety of products and services designed for academics, neutrals, experts and lawyers in the field of securities arbitration and litigation. Mr. Ryder has, in his long career, worked as District Counsel and Director of Arbitration (NASD), head of litigation and advisory affairs with a natonal wirehouse, a litigator, mediator, arbitrator, and expert witness. He is also a member of the Board of Directors of the Securities Experts Roundtable.

Speakers:

Matthew Farley recently retired as a partner in Drinker Biddle & Reath's New York office. For over 40 years, Mr. Farley has represented the financial services industry, including brokerage firms and individual representatives, in litigation and in arbitration, in SEC, state and SRO regulatory proceedings. He's been a frequent speaker at professional seminars, broad programs and securities industry meetings on topics relating to legal issues and trends of concern to the industry, including those involving arbitration practice.

George H. Friedman is principal of George H. Friedman Consulting LLC and also serves as Chairman of the Board of Arbitration Resolution Services Inc., a completely cloud-based ADR provider. He retired in 2013 as FINRA's Executive Vice President and Director of Arbitration, a position he held for 14 years. He previously held a variety of positions of responsibility at the American Arbitration Association for 22 years, mostly recently as Senior Vice President. Mr. Friedman is an adjunct professor of law at Fordham Law School, where he has taught a course on dispute resolution since 1996, and is both a member of the Editorial Board of *Securities Arbitration Commentator* and a *SAC* Contributing Editor.

Deborah Masucci is a full-time Mediator and Arbitrator, as well as Chair and Board Member of the International Mediation Institute, and Chair-Elect of the NYSBA Dispute Resolution Section. She is a global expert in alternative dispute resolution and dispute management, with over 30 years of experience in promoting the effective use of ADR in the securities, employment, insurance, commercial, and international areas. Deb has served on the Editorial Board of *Securities Arbitration Commentator* since its inception in 1988, as which point she was NASD Director of Arbitration.

Peter Mougey is recognized as one of Florida's top 100 trial lawyers, a Florida Super Lawyer in securities litigation, and is a past President of the international organization, PIABA, (Public Investors Arbitration Bar Association). In addition, Mr. Mougey has also been rated AV preeminent by his peers through Martindale Hubble. He is a Shareholder with Pensacola, Florida's Levin Papantonio, where he heads the securities and business litigation department.